75-3991

IN THE

Supreme Court of the United States

October Term, 1975

NO. 49,973

CHARLES NORMAN,
Petitioner

v.

THE STATE OF TEXAS,
Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE TEXAS COURT OF CRIMINAL APPEALS

LACKSHIN NATHAN & BERG
DAVID H. BERG
Attorney in Charge
707 Central National Bank Bldg.
2100 Travis Street
Houston, Texas 77002
713 - 224-3222

Alpha Law Brief Co., One Main Plaza, No. 1 Main St., Houston, Texas 77002

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PETITION FOR A WRIT OF CERTIORARI TO THE TEXAS COURT OF CRIMINAL APPEALS

Petitioner prays that a writ of certiorari issue to review the judgment of the Texas Court of Criminal Appeals entered on the 4th day of June, 1975.

CITATION TO OPINIONS BELOW

The opinion of the Court of Criminal Appeals of Texas upholding the sentence rendered by the 181st District Court of Potter County, Texas, is printed in Appendix A.

JURISDICTION

The judgment of the Texas Court of Criminal Appeals was entered on June 4, 1975. The jurisdiction of this Court is invoked under U.S.C. 1254, Section 1 and Rule 22(2), Revised Rules of the Supreme Court of the United States.

By mailgram dated September 2, 1975, Petitioner sought to apprise this Court of his application for an extension of time within which to file a Petition for a Writ of Certiorari to the Texas Court of Criminal Appeals, which also was sent September 2, 1975. *Schacht v. United States,* 90 S.Ct. 1555.

THE QUESTIONS PRESENTED

The federal questions involved in this case include, but are not limited to, the following:

1. Whether or not the introduction of evidence consisting of unauthenticated tape recordings obtained without the defendant's consent constitute a violation of several of defendant's constitutional rights including, but not limited to, rights to a fair and impartial jury under the Sixth and Fourteenth Amendments to the Constitution, rights of due process under the Fifth and Fourteenth Amendments, the right to equal protection guaranteed under the Fourteenth Amendment and rights of privacy inherent in the first ten Amendments to the Constitution of the United States.

2. Whether or not the introduction of a criminal offense not charged in the indictment, i.e., defendant's threat to kill someone, recorded on the above-mentioned tape, constituted a violation of Petitioner's rights of due process

under the Fifth, Sixth and Fourteenth Amendments to the Constitution of the United States.

CONSTITUTIONAL PROVISIONS INVOLVED

The constitutional provisions involved are the right to a fair and impartial jury under the Sixth and Fourteenth Amendments to the Constitution of the United States, the rights of due process under the Fifth and Fourteenth Amendments, the right of equal protection under the Fourteenth Amendment and the right of privacy inherent under the Fourth and Fifth Amendments to the Constitution of the United States.

STATEMENT

Petitioner was indicted for the offense of engaging in the business of bookmaking, and after a trial before a jury, was found guilty and sentenced to eight months in the Potter County jail and a fine of $1,000.00. The State's sole witness was one Glen Charles Hill, an undercover policeman who had just started to work for the Amarillo Police Department. During the testimony of witness Hill, tapes were introduced into evidence by the State which disclosed two men arranging wagers on football games occurring on various evenings of the fall of 1974.

These tapes, which were introduced without benefit of any of the requisite predicates, also introduced evidence that Petitioner was guilty of another crime, i.e., threatening to kill someone.

On this unauthenticated and uncorroborated evidence Petitioner was convicted on the offense of bookmaking and received an eight month sentence plus a $1,000.00 fine.

REASONS FOR GRANTING THE WRIT

The above-stated facts of this case allow this Court to reaffirm the constitutionally vital holding handed down in *Griswold v. State of Connecticut,* 85 S.Ct. 1678 (1965). The introduction of tape recordings in this instance against Petitioner was a direct violation of his constitutional right of privacy as set down in *Griswold, supra.* According to the Court in *Griswold, supra,* the First Amendment has a penumbra where privacy is protected from governmental intrusion. The Court goes on to say that

> the Fourth and Fifth Amendments as described in *Boyd v. United States,* 16 U.S. 616, 630, 6 S.Ct. 524, 532, 29 L.Ed. 746 are a protection against all governmental invasions of the sanctity of a man's home and the privacy of life.

The Court said in full about this right of privacy,

> The principles laid down in this opinion affect the very essence of constitutional liberty and security. They reach further than the concrete form of the case then before the Court with its adventitious circumstances. They apply to all invasions on the part of the government and its employees of the sanctity of a man's home and the privacies of life. It is not the breaking of his doors and the rumaging of his drawers that constitute the essence of the offense but it is the invasion of his indefeasible right of personal security, personal liberty and private property. It is the invasion of this sacred right which underlies and constitutes the essence of Lord Camden's judgment.

The Court has also referred to *Mapp v. Ohio,* 367 U.S. 643, 656, 81 S.Ct. 1684 (1962), 6 L.Ed. 1081 interpreting the Fourth Amendment as creating a right to privacy

no less important than any other right carefully and particularly preserved to the people. See *Beane,* The Constitutional Right to Privacy, 1962 S.Ct. Rev. 212, *Griswold,* The Right To Be Let Alone, 55 Northwestern University Law Review 216 (1960). In the *Griswold* opinion the Court calls the right of privacy "a right older than the Bill of Rights, older than our political parties, older than our school system."

Not only has the prosecution violated Petitioner's inherent right to privacy in introducing the tapes into evidence, the prosecution has also failed to lay a proper foundation for their introduction as required in *Gillars v. United States,* 192 F.2d 962, 87 App. D.C. 1950; and *Burgman v. United States,* 188 F.2d 637, 639, 88 D.C. App. 164 (cert. den.); 342 U.S. 838, 72 S.Ct. 64. Tape recordings can only be admitted in evidence provided a proper foundation has been laid for their admission. A proper foundation, Judge Herlands wrote, consists of establishing the following elements:

(1) That the recording device was capable of taking the conversation now offered in evidence.

(2) That the operator of the device was competent to operate the device.

(3) That the recording is authentic and correct.

(4) That changes or deletions have not been made in the recording.

(5) That the recording has been preserved in a manner that it is shown to the Court.

(6) That the speakers are identified.

(7) That the conversation elicited was made voluntarily and in good faith, without any kind of inducement.

U. S. v. McKeever, 169 F. Supp. 426, 271 F.2d 669; *Soloman, Inc. v. Edgar,* 92 Georgia Appeals 207, 88 S.W. 2d 167, 171 (1956). The Court should refuse to admit a recording into evidence if speaker identification or any of the other elements of authentication are lacking. *U. S. v. McKeever, supra; Todisco v. United States,* 298 F.2d 208, 211, 9th Circuit 1961 (cert. den.), 368 U.S. 989, 82 S.Ct. 602, 7 L.Ed.2d 527 (1962).

The Texas Court of Criminal Appeals rendered its decision upholding the trial court's verdict without benefit of the tape recordings as required by Texas Code of Criminal Procedure, Section 38.08 and *Vera v. State,* Cr.App. 1967, 428 S.W.2d 664; *Williams v. State,* Crim. App. 1971; 466 S.W.2d 313.

The prosecution failed, in introducing this tape recording involving the defendant, to separate hearsay and immaterial matters from the remainder of the recording. Hearsay and immaterial matters such as placing bets with other bookmakers were not excluded as required by *State v. Mottram,* 1962, 158 M.E. 325, 184 A.2d 225. Here it was held proper for the trial court to exclude from evidence a recording of a conversation involving the defendant, his lawyer and other persons on the grounds that counsel failed to separate hearsay and immaterial matters from the remainder of the recording.

Since the advent of Watergate the American public has been perplexed by the apparent legality of the tape recording of phone calls; here the Court has a perfect opportunity to explain to the country why such insidious activities are legal or, even better, why this Court will reverse itself, condemn the practice and perhaps save us from becoming a nation of spies.

II.

Not only was the evidence contained on the tape violative of Petitioner's constitutional rights to privacy, and introduced without the proper predicate, its introduction also violated several other well-settled rules of evidence. By introducing the above-mentioned tapes, the District Attorney introduced evidence of Petitioner's character without first giving the defense the opportunity to put Petitioner's character into issue, inasmuch as the tapes contained a threat by Appellant to kill someone; thereby the District Attorney attempted to show that Petitioner possessed a criminal nature and thus was more likely to have committed the crime in question. The long established rule forbids the prosecution, unless and until the accused gives evidence of his good character, to initially introduce evidence of the bad character of the accused. *Martin v. People,* 144 Colorado 120, 162 P.2d 597; *State v. Willard,* 142 S.W.2d 1046; *Jones v. LaCrosse,* 23 S.E.2d 142; 1 Wigmore, Evidence, Sections 55 and 57.

The danger of prejudice is at its highest when character is shown by other criminal acts and the rule against the proof of other crimes is but an application of the wider prohibition against the initial production by the prosecution of evidence of bad character. The evidence of an extraneous offense was offered solely for the purpose of showing the Petitioner committed the crime on trial because he is a person of criminal nature. This evidence was not introduced to show motive, common scheme, design, malice or intent. Evidence of other crimes offered solely to show that the defendant is a person of criminal nature has been barred by the Courts. *Swann v. U.S.,* 95 F.2d 689, *State v. Scot,* 75 P.2d 1016; *Lovely v. State,*

169 F.2d 386. In *People v. Molineux,* 168 N.Y. 264, the general rule of evidence, set down applicable to criminal trials, is that the State cannot prove against the defendant any crime not alleged in the indictment either as a foundation for separate punishment or as aiding the proof that he is guilty of the crime alleged.

There can be one unmistakable conclusion, that the extraneous offenses on the tapes were introduced to show that Petitioner had violated not only the law of book-making, but also certain state laws regarding attempted murder. The overall effect of this testimony is evidenced by the eight month, $1,000 fine imposed on Petitioner. Thus, Petitioner urges that his right to a fair trial under the Fourth, Fifth, Sixth and Fourteenth Amendments to the Constitution of the United States have been abridged.

CONCLUSION

For the reason set forth above, it is respectfully submitted that this Petition for Writ of Certiorari should be granted and the decision of the Texas Court of Criminal Appeals should be reversed.

Respectfully submitted,

LACKSHIN NATHAN & BERG

By:_____

DAVID H. BERG
Attorney in Charge
707 Central National Bank Bldg.
2100 Travis Street
Houston, Texas 77002
713 - 224-3222

CERTIFICATE OF DELIVERY

I, David H. Berg, attorney and a member of the Bar of the Supreme Court of the United States, depose and say that on the _____ day of September, 1975, triplicate copies of the foregoing Petition for Writ of Certiorari in the Supreme Court of the United States were served by United States mail on the Honorable John J. Wheir, Assistant District Attorney, attorney of record for the Respondent.

_____

DAVID H. BERG

SUBSCRIBED AND SWORN TO before the undersigned authority this the _____ day of September, 1975.

_____

Notary Public in and for
Harris County, Texas

APPENDIX A

NO. 49,973

CHARLES NORMAN, Appellant

vs.

THE STATE OF TEXAS, Appellee

Appeal from POTTER County

O P I N I O N

Appellant was convicted of bookmaking; punishment was assessed at eight months in jail and a fine of one thousand dollars.

In his only ground of error, appellant asserts the trial court erred in granting the State's motion in limine limiting cross-examination of a State witness. In ruling upon the motion, the trial court explained its ruling as follows, indicating the proper purpose of a motion in limine:

> "I will grant the motion until the Defendant approaches the bench and gives me a chance to rule on it outside the presence of the jury.
>
> * * *
>
> "Counsel, I'm not telling you that if you will present this to me outside the hearing of the jury it won't be admissible, that's not what I'm saying. I am simply saying I want to hear it outside the presence of the jury before you go into it."

The record reflects that the following constituted the only further consideration of the subject matter of the motion in limine:

"[Defense counsel]: Your Honor, may we approach the bench?

"THE COURT: You may.

"(The following proceedings were had at the bench out of the hearing of the jury.)

"[Defense counsel]: Your Honor, I want to go into him being fired from the Police Department in Sayre.

"THE COURT: Well, I think that's in the Motion in Limine, and I will stand with the motion, counsel.

"[Defense counsel]: Note our exception.

"THE COURT: I will stand with the previous ruling."

The purpose of a motion in limine is to prevent particular matters from coming before the jury. It is, in practice, a method of raising objection to an area of inquiry prior to the matter reaching the ears of the jury through a posed question, jury argument, or other means. As such, it is wider in scope than the sustaining of an objection made after the objectionable matter has been expressed. However, it is also, by its nature, subject to reconsideration by the court throughout the course of the trial. This is because it may not be enforced to exclude properly admissible evidence.

From the *mere* granting of a motion in limine, it is not possible for the reviewing court to know what, if any, specific evidence or other matters have been excluded.[1]

1. The ruling of a court on a motion in limine is not within the scope of the rule of Article 40.09(6)(d)(3), V.A.C.C.P., which provides that an objection "to offered evidence out of the presence of the jury" need not be "renewed in the presence of the jury." Powers v. State, 456 S.W.2d 97, is not in conflict with the rule announced here. Involved there was the admissibility of specific evidence, which is precisely what is not the case here. This is one distinction between a motion in limine and a motion to suppress.

It is upon a reconsideration and the offer and exclusion of specific matter that the record is made to show what in fact was excluded from presentation to the jury, and it is upon such a record that the reviewing court must make its determination of whether reversible error is reflected in the record. Consequently, it is not the granting of a motion in limine which constitutes the basis for complaint on appeal, particularly since such disposition of the motion is subject to reconsideration upon tender of admissible evidence; it is, rather, the exclusion of the particular matter offered with the request for reconsideration which must be the basis for complaint on appeal.[2]

The record in the instant case does not reflect a tender and exclusion of particular evidence. There is no showing of what *evidence,* if any, was improperly excluded. Counsel merely requested to go into matters within the scope of the motion without showing what evidence he would have presented to the jury. Nothing is presented for review.

The judgment is affirmed.

ODOM, Judge

(Delivered June 4, 1975)

2. In Brazzell v. State, 481 S.W.2d 130, 131, this Court said:
"... Generally, a motion *in limine* will not preserve error to the admission of inadmissible evidence. The violation of a motion *in limine* may entitle a party to relief, but any remedies available with regard to such a violation are with the trial court. If its order has been violated, the trial court may apply the sanctions of contempt or take other appropriate action. But for error to be preserved on appeal with regard to the admission of inadmissible evidence, objection thereto should be made at the time the evidence is offered."

NO. 49,973

CHARLES NORMAN, Appellant

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Appeal from POTTER County

CONCURRING OPINION

I concur in the affirmance of this conviction, but would do so upon the basis that appellant failed to perfect his bill of exception and would not engage in an unnecessary discussion of the purpose of a motion in limine and other matters not germane here.

Appellant's punishment was assessed at eight (8) months in jail and at a fine of $1,000 by the jury following his conviction for bookmaking.

In his sole ground of error appellant complains of the court's action in sustaining the State's motion limiting the cross-examination of Glen Charles Hill, a witness for the prosecution.

The record reflects that Hill, while working as an undercover agent for the Amarillo Police Department, made the case against the appellant and was thus the State's material witness.

Prior to trial the State filed at least three motions in limine, requesting in the first that defense counsel be instructed not to mention, refer or allude to "any alleged action of misconduct, if any, on the part of" Hill, "which did not result in a conviction in a court of record for a crime involving moral turpitude" and further requested

counsel be instructed not to refer to "the sentence" in the State v. Bluejacket case. The other two motions in limine by the State asked that defense counsel be instructed not to elicit the "results" of the Phillips case or the "disposition" of the Bewley case.

The court entered a written order granting all three motions. It also orally granted the three motions before the commencement of trial, stating when counsel asked for a clarification as to the motions as to Bewley and Phillips, "Well, am I correct that Bewley was dismissed and that Phillips was acquitted?" The prosecutor replied in the affirmative. In connection with the first motion mentioned, the court stated:

> "Counsel, I'm not telling you that if you will present this to me outside the hearing of the jury it won't be admissible, that's not what I'm saying. I am simply saying I want to hear it outside the presence of the jury before you go into it. I would like to have your cases, counsel."

On cross-examination of Hill appellant established that, among other places, Hill had lived in Sayre, Oklahoma, where he had been employed by the police department for "not quite a month." At this point appellant's counsel approached the bench and stated, out of the hearing of the jury, "Your Honor, I want to go into him being fired from the Police Department in Sayre." The court indicated, "I will stand with the Motion (in limine)," to which action the appellant excepted. At no time did the appellant by informal bill of exception, offer proof by a concise statement with the court's approval (Article 40.09, Sec. 6(d)(1), Vernon's Ann. C.C.P.), or otherwise show what the excluded testimony would have been if he had

been permitted to elicit it in the jury's presence. This court is thus not in a position to review appellant's contention. See Hicks v. State, 493 S.W.2d 833 (Tex. Cr. App. 1973).

Appellant asserts in his brief that Hill was fired from his employment with the Sayre, Oklahoma Police Department because of his involvement with burglaries. It is well established that this court cannot accept as fact allegations or assertions in an appellate brief which are not supported by the record. Washington v. State, 500 S.W.2d 485 (Tex. Cr. App. 1973); Devereaux v. State, 473 S.W.2d 525 (Tex. Cr. App. 1971).

It would be on this basis that I would affirm the case.

I would pretermit any discussion about the purpose of a motion in limine, for its discussion is totally unnecessary to the proper disposition of the case. This case simply does not turn on whether the *State* filed a motion in limine. Just why the majority reaches out and attempts to discuss the purpose of such motion and seemingly attempts to limit the scope of such motion is not clear. Nor would I gratuitously hold that a ruling on a motion in limine is not such an objection which need not be renewed in the presence of the jury. See Article 40.09(6)(d)(3), Vernon's Ann. C.C.P. In the instant case, the *State's* motion in limine was granted and there was no testimony offered out of the jury's presence to which there had been an objection as contemplated by the above mentioned statute. Here, the motion in limine, as granted, prevented the appellant from offering certain testimony before the jury without first obtaining the approval of the court. The appellant's counsel did approach and request to elicit or attempt to elicit the testimony desired; the court refused. Under this fact

situation, it puzzles this writer as to just why the majority would add footnote #1 to its opinion. It does not fit the facts of this case. If the majority means to hold that where the defendant, as opposed to the State, makes a motion in limine which is granted the defendant still must object if the State violates such ruling on the motion in limine during the trial on the merits, why make such holding where that is not the fact situation?

But again, even where those were the facts, the favorable ruling on the defendant's motion in limine might not necessarily relate to or involve objected to evidence offered out of the presence of the jury, and, even if it did, why make a distinction between where evidence is offered out of the jury's presence on a motion in limine or other occasions where the evidence is offered out of the jury's presence? Why so limit Article 40.09(6)(d)(3), supra? I am at a loss to understand why the provisions of this statute were injected into this case or why there had to be a discussion of the purpose of a motion in limine at all.

I concur in the result only.

ONION, Presiding Judge

(Delivered June 4, 1975)

Morrison, J., concurs in this opinion.

NO. 49,973

CHARLES NORMAN,
Appellant

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THE STATE OF TEXAS,
Appellee

Appeal from Potter County

CONCURRING OPINION

I concur in the result reached for the sole reason that appellant did not show what evidence was excluded.

Douglas, Judge

(Delivered June 4, 1975)